

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 18, 2006 Session

TIMOTHY ALEXANDER STRAIT v. LOUISE DAVENPORT STRAIT

Appeal from the Chancery Court for Hamilton County
No. 94-75173 Howell N. Peoples, Chancellor

No. E2005-02382-COA-R3-CV - FILED NOVEMBER 29, 2006

In this post-divorce case, Timothy Alexander Strait (“Husband”) appeals (1) the trial court’s denial of his petition to terminate his alimony *in futuro* obligation to his former wife, Louise Davenport Strait (“Wife”), and (2) the trial court’s judgment awarding Wife an alimony arrearage of \$22,750. Wife raises a separate issue challenging the trial court’s denial of her request for suit fees. As modified, the trial court’s judgment is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed as Modified; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Marvin Berke, Andrew L. Berke, Chattanooga, Tennessee, for the appellant, Timothy Alexander Strait.

Roger W. Dickson, Leah M. Gerbitz, Chattanooga, Tennessee, for the appellee, Louise Davenport Strait.

OPINION

I.

Husband and Wife were divorced on May 5, 1995. The judgment of divorce incorporated the parties’ agreement. As pertinent to the issues on this appeal, the judgment provides that Husband would pay Wife alimony *in futuro* in the following monthly installments: \$5,500 from August 15, 1995 until July 15, 1997; \$4,500 from August 15, 1997 until July 15, 1999; and \$3,250 from August 15, 1999, until Wife’s remarriage or death.

On March 22, 2005, Husband, invoking the provisions of T.C.A. § 36-5-121(f)(2)(B),¹ filed a petition asking the trial court to terminate his alimony *in futuro* obligation, or in the alternative, to decrease the amount of his ordered alimony. Husband's petition specifically states:

[Wife] has had a third party living in her home for a period of time believed to be in excess of two (2) years. Pursuant to Tennessee Code Annotated § [36-5-121(f)(2)(B)], a rebuttal [sic] presumption is raised that (A) the third party is contributing to the support of the alimony recipient, thus, the alimony recipient does not need the amount of support previously awarded or (B) the third person is receiving support from the alimony recipient, thus, the recipient does not need the amount of alimony previously awarded. In either circumstance, Tennessee Code Annotated § [36-5-121(f)(2)(B)] provides that the court can suspend all or part of the previously ordered alimony payments.

In her answer filed April 6, 2005, Wife admitted the allegations of the first sentence of the above quoted paragraph, *i.e.*, that she had a third party living in her home for over two years. However, she denied that Husband was entitled to the relief sought. Wife asked that Husband be held in contempt because he had unilaterally stopped paying alimony on January 1, 2005.² She requested that the court deny Husband's petition and order him to pay all alimony due, plus interest, as well as her legal expenses and costs.

The trial court conducted a hearing at which Husband, Wife, and the "third party," Donald Yokeley, testified. Following the hearing, the trial court entered an order on September 13, 2005, dismissing Husband's petition *in toto* and ordering him to pay Wife an alimony arrearage in the amount of \$22,750.

The final order incorporates the following findings of fact and conclusions of law made by the trial court from the bench at the conclusion of the hearing:

Once alimony *in futuro* has been ordered, it can be changed upon showing a change of circumstances. The burden is on the party who alleges a change of circumstances to prove by a preponderance of the evidence such a change. In the present case that burden is upon [Husband].

¹ The petition referred to the statute by its then-designation, T.C.A. § 36-5-101(a)(3). The numbering of the statute was changed effective July 1, 2005, in advance of the trial of this matter on August 29, 2005. We will refer to the new section number throughout this opinion.

² Husband resumed his alimony payments in August, 2005, just before the trial of this matter began.

According to the evidence submitted, and that's what the Court has to decide the case on, [Husband's] income in 2005 is approximately the same as it was at the time of the divorce in 1995, about \$380,000 a year. [Wife's] assets and her income are approximately the same as they were in 1995. So basically there is no significant change of circumstances in either his income or her assets and income.

There is also an allegation that alimony should be modified or terminated based upon Tennessee Code Annotated [36-5-121(f)(2)(B)]. That has to do with a party who receives alimony either living with or having someone live with them. The statute states that under such circumstances a rebuttable presumption is raised either: (1) that this third person is contributing to the support of the alimony recipient and that the alimony recipient therefore does not need the continuing alimony support; or (2) that the third person is receiving support from the alimony recipient and the alimony recipient therefore does not need continuing alimony support.

At the time this petition was filed in March 2005 and for three years preceding the filing of this petition, Donald Yokeley lived with [Wife]. During this period of time Mr. Yokeley had various temporary jobs and according to the evidence earned approximately a thousand dollars or so a year. He received food stamps during this time. [Wife] paid some medical and dental expenses for him. She purchased some clothing for him. She made some small gifts to him and to his children. She paid for several trips they made together. In June 2005 she paid his first month's rent for his separate apartment.

The evidence is that in the last two months he has lived at that apartment approximately 10 to 15 days a month each month. The Court finds that Mr. Yokeley has also assisted [Wife] at times when she had injuries or sickness. There is, however, no evidence that he has contributed to her financial support. In fact, it's fairly apparent that he doesn't have the wherewithal to make financial contributions.

The Court finds that Mr. Yokeley no longer lives with [Wife] at all times. Even when he did, the evidence is that she didn't contribute substantially to his support, but to the extent that she did the expenditures for him were not of large amounts. The evidence establishes that if the alimony payments cease [Wife] will be required to dissipate her separate property that she had prior to the marriage and the property she received as part of her division of the marital assets.

The Court therefore finds that the statutory presumption is rebutted by the evidence and the petition to terminate alimony should be dismissed. [Husband] will be required to pay the arrearage of alimony in the amount of \$22,750 and the cost of this cause. . . .

II.

Husband raises the following issue, taken verbatim from his brief:

Whether the trial court erred in refusing to suspend alimony despite [Wife's] cohabitation and support of a third party, as well as her failure to [present] any proof to overcome the statutory presumption of a suspension of the alimony in futuro.

He asks us to reverse the trial court's judgment dismissing his petition. He further requests that we "suspend all alimony completely, and order [Wife] to reimburse [him] for alimony paid to her since the filing of the petition."

As we understand Husband's brief, he seeks the following relief: first, that we suspend his alimony obligation for all payments due from and after the filing of his petition; and second, that we order Wife to reimburse him for all payments made by him "since the filing of the petition."

This case involves the interpretation and application of T.C.A. § 36-5-121(f)(2)(B):

(B) In all cases where a person is receiving alimony in futuro and the alimony recipient lives with a third person, a rebuttable presumption is raised that:

(i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse.

(ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.

Given the issues raised by Husband, we must decide whether this statute as applied to the facts of this case warrants the suspension, in whole or in part, of Husband's alimony obligation to Wife from and after the date of filing of Husband's original petition or for any lesser period of time that ensued after the filing of the petition.

Wife raises a separate issue. She contends that the trial court erred in denying her request that Husband pay her attorney's fees associated with her defense of his petition.

III.

Our review of the trial court's findings of fact is *de novo* upon the record, accompanied by a presumption of correctness, a presumption we must honor unless the preponderance of the evidence is against those findings. Tenn. R. App. P. 13(d); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). There is no presumption of correctness as to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

IV.

Donald Yokeley worked as a forklift driver in Winston Salem, North Carolina, prior to the time he met Wife and began a relationship with her in 2001. In 2002, Mr. Yokeley quit his job and moved into Wife's home in Chattanooga. He lived with Wife until June, 2005, when he obtained a full-time job and moved into his own apartment. Up until that time, Mr. Yokeley did odd jobs through temporary agencies and earned approximately \$1,000 per year in each of the years of 2002, 2003, and 2004. He also used money from a 401(k) plan as a source of income, withdrawing over \$10,000 from the account for some of his expenses over the same years.

According to Mr. Yokeley, Wife paid for the home expenses and utilities during the time that he lived with her. He helped around the house by repairing things that needed to be fixed and also helped Wife when she was recovering from various surgeries. Mr. Yokeley testified that he received food stamps and paid for his own groceries with this assistance. He used Wife's address as his own when applying for food stamps. Wife bought his food to the extent that he was unable to satisfy his needs with the food stamps. Mr. Yokeley stated that Wife bought a Dodge van in 2004, and put the title in his name; however, he explained that the van was "basically hers." He said that he paid for his own gas. Wife also purchased clothing for Mr. Yokeley, including a suit, sport coats, pants, shirts, and T-shirts.

Mr. Yokeley also admitted that Wife paid approximately \$3,000 for an operation he underwent and approximately \$600 for a dental bill he incurred. She would also give him money "here and there." In 2003, he received a check from her in the amount of \$1,000, but he did not recall the purpose. He also received several checks from her for about \$400 to \$600. Wife would also give money to Mr. Yokeley's children. Over the years, she has taken Mr. Yokeley on several trips to California and Florida. She paid for all of the airfare, hotel, and food expenses.

Since moving out of Wife's home and getting his own apartment, Mr. Yokeley has continued to spend the night at Wife's house on multiple occasions. He testified that he has spent approximately 10 to 15 days per month at his own apartment and that he plans to stay at his place most of the time from this point on. Mr. Yokeley admitted that Wife paid his rent for the first month.

Wife's testimony was similar to that of Mr. Yokeley's. She confirmed that Mr. Yokeley lived with her for several years until he moved out in June, 2005. According to Wife, Mr. Yokeley fixed things around the house and worked in the yard. He also helped her when she had various surgical procedures. Wife explained that she and Mr. Yokeley intend to live separately from this point on because they need their own space, although he still spends weekends with her.

Wife described Mr. Yokeley as a "low maintenance" man, who did not demand much when it came to food and clothing. She verified that she bought some of his groceries, while he paid for the rest with food stamps. She also bought him various items of clothing on sale. In addition, she stated that she gave Mr. Yokeley various sums of money over the last few years, but she stated that the money she gave him came from her own dividends, not from alimony. She admitted that she wrote checks for \$100 or \$200 to Mr. Yokeley's children for birthday and Christmas gifts.

Wife also admitted that she has taken Mr. Yokeley on several trips and that she bought a van and put it in his name. She stated that he paid for his own gas, unless he was running errands for her, in which event she would pay for the gas. Wife acknowledged that she paid \$3,000 to one of his doctors for a surgery he underwent. She paid another doctor related to this surgery but could not recall the amount. Wife also paid Mr. Yokeley's first month of rent in the amount of \$395, but she stated that Mr. Yokeley reimbursed her.

In addition to testifying about the living arrangement with Mr. Yokeley, Wife also testified generally about her assets. She owns a townhouse for which she paid \$315,000. She has no mortgage but she does pay utilities. She also owns a 1997 Honda Accord. She has stocks with a market value of \$1,064,288.38. She receives dividends from these stocks, and she recently sold \$22,000 worth of SunTrust bank stock because she needed extra money. Wife testified that she does not want to keep liquidating her stock holdings. In 2004, she received \$16,000 from the dissolution of her father's trust. She still receives \$1,800 quarterly from her great grandmother's trust. She recently received \$8,000 from selling Cousins Properties stock. She maintains an IRA account worth approximately \$107,000. She has a savings account with a minimal balance. Wife gave \$5,000 or \$6,000 to charities in 2004. Wife explained that Husband has not paid her alimony from January through July, 2005, causing her to have many overdrafts on her bank account. She confirmed that Husband resumed his alimony payments in August, 2005.

Based upon this evidence, the trial court found that Mr. Yokeley no longer lived with Wife, and even when he did, Wife did not contribute substantially to his support. The trial court also determined that Wife will be required to dissipate her separate and marital property if the alimony *in futuro* payments cease. Finally, the trial court concluded that Wife rebutted the statutory presumption that she no longer needs the support previously awarded. We must determine whether the evidence preponderates against these findings.

V.

A.

Husband contends that Wife lived with and supported Mr. Yokeley within the meaning of T.C.A. § 36-5-121(f)(2)(B). Husband also asserts that Wife failed to rebut the statutory presumption that she does not need the amount of alimony previously awarded. Therefore, he argues that the trial court erred in failing to completely suspend his alimony *in futuro* obligation and in ordering him to pay an alimony arrearage.

B.

In Tennessee, there is a rebuttable presumption that a recipient of alimony *in futuro* no longer needs alimony when he or she resides with a third party. T.C.A. § 36-5-121(f)(2)(B); **Wright v. Quillen**, 83 S.W.3d 768, 775 (Tenn. Ct. App. 2002). The purpose underlying this statute is to provide an alternative method of proof when the changed circumstance is the cohabitation of the alimony recipient with a third person. **Wright**, 83 S.W.3d at 775; **Azbill v. Azbill**, 661 S.W.2d 682, 686 (Tenn. Ct. App. 1983). However, cohabitation does not automatically end the right of the recipient to receive alimony. **Wright**, 83 S.W.3d at 775; **Isbell v. Isbell**, 816 S.W.2d 735, 738 (Tenn. 1991). Rather, such a living arrangement shifts the burden of proof to the recipient to show a continued need for the alimony previously awarded. **Wright**, 83 S.W.3d at 775; **Azbill**, 661 S.W.2d at 686.

In two recent decisions, **Woodall v. Woodall**, No. M2003-02046-COA-R3-CV, 2004 WL 2345814 (Tenn. Ct. App. M.S., filed Oct. 15, 2004), and **Evans v. Evans**, No. M2002-02947-COA-R3-CV, 2004 WL 1882586 (Tenn. Ct. App. M.S., filed Aug. 23, 2004), this Court faced factual scenarios involving living arrangements with a third party that ceased shortly after a petition to modify alimony was filed. In **Woodall**, the wife lived with another man for several months but moved out shortly after the husband filed his petition for a modification of the alimony obligation. 2004 WL 2345814, at *4. In **Evans**, the wife lived with another man for periods of time over several years but purchased her own condominium shortly after the husband filed a petition to terminate or decrease the alimony award. 2004 WL 1882586, at *1-2. Emphasizing that the living situation *at the time of trial* must be considered in determining whether the statute applies, we held, in both cases, that the evidence did not preponderate against the trial court's finding that the wife was not living with the other man. **Woodall**, 2004 WL 2345814, at *5; **Evans**, 2004 WL 1882586, at *5-6.

In the instant case, we hold that the evidence does not preponderate against the trial court's finding that Mr. Yokeley no longer lives with Wife. Indeed, it is undisputed that Mr. Yokeley moved out of Wife's home in June, 2005 and secured his own apartment, albeit with initial assistance from Wife. Because the cohabitation ended, rendering T.C.A. § 36-5-121(f)(2)(B) inapplicable going forward, we need not consider Wife's current need for alimony and whether she rebutted the statutory presumption. See **Woodall**, 2004 WL 2345814, at *6 ("since the cohabitation had ended by the time of the trial, the wife's current need was not put at issue absent a substantial and material

change of circumstances”). We agree with the trial court that there has been no *general*, unrelated to the statute, change in the parties’ circumstances. Therefore, we affirm the trial court’s decision to dismiss Husband’s petition to terminate his alimony *in futuro* obligation going forward. There is simply no basis for suspending Husband’s alimony *in futuro* obligation completely for all payments due from and after the filing of his petition when the alleged changed circumstance, *i.e.* Mr. Yokeley’s cohabitation with Wife, no longer exists.

C.

Next, we must address Husband’s request that we order Wife to reimburse him for all payments made by him “since the filing of the petition.” We agree that Husband is entitled to a limited reimbursement.

Although the statute was found to be inapplicable in both **Woodall** and **Evans**, the Court of Appeals in both cases made some pertinent comments on the subject of an alimony payor being entitled to relief from an alimony obligation between the time of filing a modification petition and the cessation of the third party living arrangement. In **Evans**, the Court of Appeals specifically acknowledged:

[w]e are mindful that a modification petition based on cohabitation will often trigger an end to that cohabitation. Faced with a potential loss of support, an alimony recipient could predictably choose to end the situation that jeopardizes that support. Whether the change in residence of the alimony recipient or the third party is genuine and permanent or whether it is a temporary subterfuge is a factual question to be determined by the fact finder. *Even where the move is determined to be genuine, however, the paying former spouse may be entitled to some relief, in the form of suspension of all or part of the alimony payments, from the time of the filing of the modification petition until the change in residence. The appropriateness of such relief would, of course, depend on the facts and particularly whether the recipient rebutted the presumption of lack of need during the relevant period.*

2004 WL 1882586, at *5 (emphasis added); *see also Woodall*, 2004 WL 2345814, at *5 n.8. The concurring opinion by Judge Koch in **Evans** agreed with the majority’s statement in this regard:

I concur with the court’s observation that spouses like [the husband] may be entitled to recover the spousal support they paid between the time they filed their petition to suspend support under [the statute] and the time their former spouse stops cohabiting. In this case, that period would have been from March 2002 through July 2002 when [the wife] moved her clothes out of [the other man’s] house. Because

[the husband] did not request this relief at trial, we cannot grant it to him on appeal.

2004 WL 1882586, at *19 n.1 (citations omitted).

In the instant case, Wife provided Mr. Yokeley, who was unemployed for the most part and eligible for food stamps, with a place to live for approximately three years, she paid for his medical and dental expenses, she purchased a van and put it in his name, she paid for some of his clothing, groceries, and gas, and she took him on several all expense paid trips. Clearly, Wife supported Mr. Yokeley to a significant degree until he moved out in June, 2005, approximately two months prior to the trial. With respect to the post-filing period of time put at issue by Husband, we hold that the evidence preponderates against the trial court's determination that Wife did not "contribute substantially to his support." In our judgment, the evidence preponderates otherwise.

In this case, the relevant period would be from March, 2005, when Husband filed his initial petition through June, 2005, when Mr. Yokeley moved out of Wife's home. The trial court's award of \$22,750 as alimony arrearage was based on Husband's failure to pay his alimony *in futuro* obligation from January, 2005 through July, 2005, a period of seven months at a rate of \$3,250 per month.

We hold that the evidence preponderates against the trial court's award of an alimony arrearage of \$22,750. The preponderance of the evidence is that Wife was substantially contributing to Mr. Yokeley's support for four of the seven months for which the trial court awarded an arrearage. For these four months, Husband should not be obligated to pay that portion of his alimony payment which can be reasonably related to Mr. Yokeley's support. We have concluded that half, *i.e.*, \$1,625, of his monthly alimony obligation can be reasonably attributed to Mr. Yokeley's support for each of these four months. We calculate the arrearage as follows:

January and February, 2005	\$ 6,500
March - June, 2005	6,500
July, 2005	<u>3,250</u>
	<u>\$16,250</u>

We modify the trial court's alimony arrearage by decreasing it from \$22,750 to \$16,250.

VI.

Finally, we address Wife's contention that the trial court erred in denying her request that Husband pay her attorney's fees associated with her defense of his petition.

This Court summarized the law regarding the recovery of attorney's fees as alimony in the case of *Eldridge v. Eldridge*, 137 S.W.3d 1, 24-25 (Tenn. Ct. App. 2002):

In a divorce case, an award of attorney's fees is treated as an award of alimony *in solido*. ***Kinard v. Kinard***, 986 S.W.2d 220, 235 (Tenn. Ct. App. 1998); ***Herrera v. Herrera***, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996). Thus, when determining whether to award attorney's fees, the trial court is required to consider the same factors used when considering a request for alimony. ***Kincaid v. Kincaid***, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995). As with alimony, need is the critical factor to be considered by the court when deciding whether to award attorney's fees. ***Herrera***, 944 S.W.2d at 390. An award of attorney's fees is proper when one spouse is disadvantaged and does not have sufficient resources with which to pay attorney's fees. ***Id.*** The question of whether to award attorney's fees, and the amount thereof, are largely left within the discretion of the trial court and will not be disturbed on appeal unless the trial court clearly abused that discretion. ***Aaron v. Aaron***, 909 S.W.2d 408, 411 (Tenn. 1995).

In light of this standard, we do not find that the trial court abused its discretion in denying Wife's request for attorney's fees. Wife had more than sufficient funds to pay her own attorney's fees.

VII.

The trial court's award of an alimony arrearage is modified so as to provide that Husband will pay an arrearage of \$16,250. The judgment is affirmed in all other respects. This case is remanded to the trial court for enforcement of its judgment as modified and the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed one-half to the appellant, Timothy Alexander Strait, and one-half to the appellee, Louise Davenport Strait.

CHARLES D. SUSANO, JR., JUDGE